A

MUHAMMAD RASID HASHIM

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
SULAIMAN DAUD JCA
ABDUL WAHAB PATAIL JCA
AZAHAR MOHAMED JCA
[CRIMINAL APPEAL NO: B-05-239-2009]

C

1 JUNE 2012

EVIDENCE: *Circumstantial evidence - Murder - Whether DNA evidence established accused was alone with deceased at time of her death - Whether injuries on deceased showed defence against assailant - Whether*

D

existence of blood-stained item at scene of crime revealed attacker's intention to kill

The appellant ('accused') was sentenced to death by the High Court for murdering a girl. He was also sentenced to 18 years' jail and ordered to be whipped five times for raping her. There

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were no eyewitnesses to the crimes and the evidence against the accused was wholly circumstantial. *Inter alia*, he was the last person to be seen with the deceased; he was found to have in his possession her mobile phone and a set of keys and the DNA

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evidence showed that his sperm was found in her body. The pathologist testified that the girl could have died of either blunt trauma injury to the head or from manual strangulation. An electric iron and a piece of raffia string, both blood-stained, were found at the scene of the crime. Denying that he had raped and

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murdered her, the accused in his defence admitted that he went to the deceased's house with a friend named Roslan to borrow money from her. During their meeting, when she raised her voice and told them to leave the house, the accused said he tried to gag her to prevent her from shouting and a struggle ensued

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between the three of them. Roslan was also arrested by police and a blood sample was taken from him. The High Court found the intention to kill was amply inferable from the physical evidence recovered from the scene of the crime in the form of the bloodied electric iron and raffia string. The DNA profiles from specimens

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taken at the scene showed they originated from at least one female and one male source. The trial court held the defence had failed to raise any reasonable doubt on the prosecution's case and convicted the accused on both charges. The accused appealed

against the decision relying largely on the ground that the evidence against him could at most only support a case for culpable homicide not amounting to murder as there was no evidence that he took any pre-meditated steps to cause her death and also because Roslan was with him when he met the deceased.

Held (dismissing appeal and affirming conviction and sentence):
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) Although there was no direct evidence of what exactly happened, the available evidence suggested at best a struggle between the accused and the deceased and no other person. The court agreed with the trial judge's finding that while Roslan was present outside the house, the only person inside the house with the deceased was the accused. (paras 17 & 28)

(2) The plain fact before the trial court based on the evidence of the pathologist was that the deceased's injuries were not self-inflicted or accidentally incurred in the course of a struggle but that they were suffered when she was defending herself against an assailant from her front. There was no error in the trial judge's assessment of the evidence before him to hold the prosecution had made out a *prima facie* case which if unrebutted or unexplained would warrant a conviction. (para 38)

(3) There was no error in or reason to disagree with the trial judge's conclusion that the accused's rebuttal or explanation in his defence did not raise a reasonable doubt on the prosecution's case. The trial judge found from the evidence that at the time the deadly assault was perpetrated on the deceased, the accused was alone with her and that no traces of Roslan's DNA was profiled from the human stains retrieved from the deceased's person or from the specimens retrieved from the various exhibits recovered at the scene of the crime. (paras 41 & 42)

(4) The record showed there was no complaint of Roslan not being called as a prosecution witness. In other words, the defence did not need Roslan's testimony. Therefore the objection that Roslan was not called to testify was not only an afterthought but it was also immaterial in the circumstances. (paras 20 & 21)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu ('tertuduh') telah dijatuhkan hukuman mati oleh Mahkamah Tinggi kerana membunuh seorang wanita. Dia juga dijatuhkan hukuman 18 tahun penjara dan dikenakan lima sebatan kerana
B merogolnya. Tiada saksi yang melihat jenayah yang dilakukan tertuduh dan keterangan yang dikemukakan terhadap tertuduh adalah semata-mata keterangan ikut keadaan. Antaranya, termasuklah bahawa dia merupakan orang terakhir dilihat bersama si mati; dia dijumpai memiliki telefon bimbit dan satu set kunci si
C mati, dan bahawa keterangan DNA menunjukkan terdapat sperma tertuduh dalam badan si mati. Ahli patologi memberi keterangan bahawa mangsa berkemungkinan meninggal dunia sama ada kerana kecederaan di kepada, atau akibat cekikan tangan di leher. Satu seterika elektrik dan seutas tali raffia, kedua-duanya mempunyai
D kesan darah, telah ditemui di tempat kejadian. Tertuduh mengakui bahawa dia telah pergi ke rumah si mati dengan seorang kawan bernama Roslan untuk meminjam wang, tetapi menafikan bahawa dia telah membunuh atau merogol mangsa. Menurut tertuduh, semasa pertemuan itu, si mati telah meninggikan suaranya dan
E meminta tertuduh meninggalkan rumahnya, dan ekoran itu berlaku pergelutan antara ketiga-tiga mereka apabila tertuduh cuba menutup mulut si mati bagi menghalangnya daripada terus menjerit. Roslan telah ditangkap oleh polis dan sampel darah telah diambil darinya. Mahkamah Tinggi mendapati bahawa niat untuk
F membunuh boleh diandaikan dengan mudah daripada keterangan fizikal, dalam bentuk seterika elektrik dan tali raffia berdarah, yang ditemui di tempat kejadian. Profil DNA yang diambil dari contoh di tempat kejadian menunjukkan bahawa ianya berasal dari sumber seorang perempuan dan seorang lelaki. Mahkamah bicara
G memutuskan bahawa pembelaan gagal membangkitkan keraguan munasabah terhadap kes pendakwaan dan telah mensabitkan tertuduh atas kedua-dua pertuduhan. Tertuduh merayu terhadap keputusan, secara pentingnya atas alasan bahawa keterangan terhadapnya, di tahap yang paling tinggi pun, hanya boleh
H menyokong kes mematikan orang tidak sampai membunuh, kerana tidak terdapat keterangan bahawa dia telah mengambil langkah-langkah terancang untuk menyebabkan kematian si mati dan juga kerana Roslan berada bersamanya ketika bertemu si mati.

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Diputuskan (menolak rayuan dan mengesahkan sabitan dan hukuman)
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Walaupun tidak terdapat keterangan terus mengenai apa yang sebenarnya berlaku, keterangan yang ada, pada tahap yang terbaik, menunjukkan pergaduhan hanya berlaku antara tertuduh dan si mati, dan tidak dengan orang-orang lain. Mahkamah bersetuju dengan dapatan hakim bicara bahawa Roslan berada di luar rumah, dan satu-satunya orang yang ada bersama si mati di dalam rumah adalah tertuduh.

(2) Fakta yang jelas di hadapan mahkamah bicara, berdasarkan keterangan ahli patologi, adalah bahawa kecederaan-kecederaan si mati bukan kerana perbuatan sendiri, atau kerana kemalangan ekoran dari suatu pergelutan, tetapi kecederaan-kecederaan tersebut dialami semasa si mati mempertahankan diri daripada serangan dari hadapannya. Tiada kekhilafan pada penilaian yang dibuat oleh hakim bicara terhadap keterangan yang ada di hadapannya dan dalam menyimpulkan bahawa pendakwaan telah membuktikan suatu kes *prima facie* yang jika tidak disangkal atau diperjelas akan mewajarkan pensabitan.

(3) Tidak terdapat kekhilafan atau alasan untuk tidak bersetuju dengan konklusi hakim bicara bahawa penyangkalan atau penjelasan tertuduh dalam pembelaannya tidak membangkitkan keraguan munasabah terhadap kes pendakwaan. Hakim bicara mendapati dari keterangan bahawa semasa serangan maut dilakukan terhadap si mati, tertuduh berseorangan dengan si mati, dan bahawa tiada kesan DNA Roslan diprofilkan dari darah manusia yang diambil dari badan si mati atau dari contoh yang diambil dari eksibit-eksibit yang diperolehi dari tempat kejadian.

(4) Rekod menunjukkan tiada bantahan dibuat mengenai kegagalan memanggil Roslan sebagai saksi pendakwaan. Dengan kata lain, pembelaan tidak memerlukan keterangan Roslan. Oleh itu, bantahan bahawa Roslan tidak dipanggil untuk memberi keterangan bukan sahaja suatu fikir semula tetapi tidak material dalam hal keadaan yang wujud.

Case(s) referred to:
Ganapathy Rengasamy v. PP [1998] 2 CLJ 1 FC ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***
Mohamad Radhi Yaacob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
PP v. Megat Shahrizat Megat Shahrur [2011] 5 CLJ 608 CA ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 180(4), 182A
Evidence Act 1950, s. 114(g)
Penal Code, ss. 300, 302, 304, 376

For the appellant - Kuldeep Kumar; M/s J Kuldeep Kumar & Co
For the prosecution - Kwan Li Sa; DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45-31-2006]

Reported by Ashok Kumar

JUDGMENT

Abdul Wahab Patail JCA:

[1] The appellant Muhammad Rasid bin Hashim was convicted and sentenced to death for causing the death of Siti Zawiah binti Sudin, an offence punishable under s. 302 of the Penal Code. He was also convicted and sentenced to 18 years imprisonment from the date of arrest and ordered to be whipped five times for raping Siti Zawiah binti Sudin, an offence punishable under s. 376 of the Penal Code.

The Charges

[2] The charges are as follows:

> Bahawa kamu pada 9 Mac 2006 di antara jam 3 petang hingga 6.20 petang, di No. 02-04, Blok Kekwa, Apartment Dahlia, Jalan 5/2 Bandar Country Homes, Rawang, di dalam daerah Gombak, di dalam Negeri Selangor Darul Ehsan, telah melakukan bunuh dengan menyebabkan kematian terhadap Siti Zawiah binti Sudin (KPT: 830412-03-5414) dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

Second Charge

Bahawa kamu pada 9 Mac 2006 di antara Jam 3 petang hingga 6.20 petang, di No. 02-04, Blok Kekwa, Apartment Dahlia, Jalan 5/2 Bandar Country Homes, Rawang, di dalam daerah Gombak, di dalam Negeri Selangor Darul Ehsan, telah merogol Siti Zawiah binti Sudin (KPT: 830412-03-5414) dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 376 Kanun Keseksaan.

The Prosecution Case

[3] There were no eyewitnesses. The prosecution evidence is circumstantial. The prosecution case may be summarised as follows:

(1) The appellant was the last person seen with Siti Zawiah binti Sudin, (the deceased).

(2) The appellant lived in his sister's apartment in front of the deceased's friend's apartment.

(3) A set of keys and a Nokia phone, being the personal belongings of the deceased were found on the appellant.

(4) The appellant had used the handphone of the deceased 012 9385231.

(5) The appellant had run away to Ipoh, Perak.

(6) DNA evidence proved that the sperm found on the deceased's vagina was that of the appellant.

(7) According to the Pathologist Dr Mohd Shah Mahmood (SP5), the cause of death was:

(a) Kecederaan kepala akibat "Blunt Trauma",

(b) Cekikan leher (manual strangulation).

[4] At the end of the prosecution case, the learned trial judge found that the prosecution had established a *prima facie* case under s. 180 of the Criminal Procedure Code and ordered the appellant to enter on his defence in respect of both charges.

The Defence

[5] The appellant was the sole witness in his own defence. He testified by way of an unsworn statement from the dock.

[6] The appellant's defence may be summarised as follows:

(1) He was with his workmate friend Roslan and they went to meet the deceased whom they have just met a few days earlier.

(2) They both went to the house of the deceased and wanted to borrow some money from the deceased, since the appellant had no money and was waiting for his salary which was due two weeks time. The deceased said that she had no money. The appellant tried to persuade her to lend money but she still did not give.

(3) The deceased then raised her voice and asked both of them to leave the house. The appellant then tried to close the mouth of the deceased as he was worried about her raising her voice.

(4) There was a struggle between the appellant, the deceased and also Roslan.

[7] In his unsworn statement, the appellant denies he raped and murdered the victim.

[8] At the end of the defence case, and after hearing submissions, the learned trial judge had acted under s. 182A of the Criminal Procedure Code to hold that the appellant's defence had failed to raise any reasonable doubt on both charges, and that the prosecution had proved its case beyond reasonable doubt. The learned judge then convicted and sentenced the appellant as set out earlier above.

Notice Of Appeal

[9] By his notice of appeal of 16 September 2009, the appellant had appealed to this court against conviction and sentence on both charges. In his petition of appeal, which we summarise below, he had only appealed in respect of the conviction and sentence under s. 302.

Petition Of Appeal

[10] The grounds set out in the petition of appeal may be summarised as follows:

(a) The learned judge erred in convicting the appellant for the offence of murder under s. 300 when at the most the evidence shows an offence under s. 304;

(b) The learned judge erred when he failed to give sufficient consideration to the unsworn statement of the appellant;

(c) The learned judge erred when he failed to appreciate there was a break in the chain of evidence;

(d) The learned judge erred when he failed to apply s. 114(g) of the Evidence Act 1950 on the prosecution;

(e) The learned judge erred when he failed to give sufficient consideration to aspects favouring the defence.

Grounds Canvassed

[11] The submission for the appellant began with the statement that the appellant canvasses the following grounds in his appeal:

(a) That the learned trial judge misdirected himself when he failed to identify with clarity under which limb of s. 300 of the Penal Code was the conviction of the appellant based;

(b) That the learned trial judge erred in law in that he failed to appreciate that at the highest it is a case of culpable homicide not amounting to murder; and

(c) The learned trial judge failed to appreciate the defence of the appellant.

[12] In the submissions before us, the first two grounds above were combined under submission "Ground One -- that at the very highest this is a case of manslaughter not amounting to murder", and the third ground became a submission that "Roslan is not a fictitious person".

[13] We now address the second ground first.

Existence Of Roslan

[14] It was submitted that:

(a) Roslan bin Hassan is not a fictitious person;

(b) His existence was brought to the attention of the police at the investigation stage, and at the trial;

(c) Encik Sukri Palatturi, (SP11), the off-duty security guard, had testified he saw another person with the appellant;

(d) Roslan was arrested and a blood sample taken.

[15] In respect of the above, two issues were brought up.

[16] The first is that there was a break in the evidence of the blood samples of Roslan (E25) and of Farusani (E26) and the possibility of a mix up of the blood samples. It was noted there were no photographs of E24 (appellant's blood sample), E25 and E26 as to the manner the exhibits were handled.

[17] The learned judge had dealt at some length with the identification of the blood samples, in particular at paras. 30, 31 and 45 of his grounds of judgment, and explained how he arrived at his finding of fact. We find no obvious error, and in the light of the evidence we hold that the possibility of a mix up of samples is, in the circumstances, nothing but idle speculation. There was no reason, therefore, for the reason to hold that the prosecution has on this issue failed to prove a *prima facie* case. Since in the defence case no evidence in rebuttal was given to raise any doubt on this issue, the finding remains as a finding of a fact proven beyond reasonable doubt. We agree with the finding of the learned trial judge that while Roslan was present outside the house, the evidence before the court showed at the end of the prosecution case that the only person inside the house with the deceased was the appellant. We will address the question of whether the appellant's evidence that Roslan was inside the house raised a reasonable doubt further below.

[18] The second issue raised is that Roslan should have been called as a prosecution witness and offered for cross-examination.

[19] Whether to call a person as a prosecution witness is always the discretion of the prosecution. Its case stands or falls on the basis of the evidence it adduces. If it fails to produce sufficient evidence for the narrative of its case, the prosecution fails. See *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1. But if the evidence adduced is sufficient for the narrative, the fact there are other evidence or witnesses but was not called is immaterial. An adverse presumption may arise only if there is a withholding. See s. 114(g) Evidence Act 1950. In this case, the record of proceedings showed at RR 299 that the prosecution had at the end of its case offered witnesses not called to the defence. It is also recorded that counsel for the defence had said "Saya akan panggil saksi yang

perlu jika pembelaan dipanggil". The record shows that on 5 August 2009 the appellant elected to give an unsworn statement marked D64 from the dock and at the end of which counsel told the court:

> OKT tidak ada saksi-saksi lain. Saya pembelaan.

[20] The record shows that both the prosecution and the defence applied for another date to enable them to file written submissions. There was no complaint of Roslan not being made available. In other words, the defence did not need the testimony of Roslan.

[21] The record clearly shows, therefore, that the objection as to Roslan not being called to be not only an afterthought but also immaterial in the circumstances and the submission thereon not supported by law or authority.

[22] We, therefore, dismiss the second ground of appeal. At the very highest this is a case of manslaughter not amounting to murder.

[23] The part of the grounds of judgment referred to for the appellant in his first ground of appeal is para. 32, where the learned judge had said:

> 32. From the above inferences, it is my finding that the ingredients of s. 300 of the Penal Code had been established by the prosecution in this case. The intention to kill could be amply inferred from the physical evidence which were recovered from the scene in the form of the bloodied electric iron (P10B) and the raffia string which was also bloodied marked 'E5', swab from knife sheath marked 'E4', all of which had been confirmed to be a mixed DNA profile originating from at least 1 female and one male source.

[24] It was submitted that in coming to this conclusion above, the learned judge did not address his mind to the following common and undisputed facts which are material considerations that ought to be put in the weighing scale to be weighed as intention is a matter of inference:

(a) That there is no evidence that the appellant was armed when he went to the apartment of the deceased;

(b) That there is no evidence that the appellant had planned to cause the death of the deceased;

(c) That there was no evidence from the prosecution as to what exactly happened between the appellant and the deceased;

(d) That there was evidence that there was another person with the appellant and with the deceased as testified by SP11 and therefore the appellant was not seen alone with the deceased;

(e) That there was no evidence that the appellant had used the electric iron to hit the deceased.

(f) There was no evidence that the appellant had used the raffia string to strangle the deceased except for the mixed DNA samples of the appellant and the deceased.

[25] Paragraph 32 is the commencement of the part of the grounds of decision relating to its ruling at the end of the prosecution case. The narratives of the consideration of the evidence by the trial judge were in the paragraphs that followed.

[26] It is trite law that judicial determination is based entirely upon the evidence that is admitted in evidence before the court. Such evidence may in themselves constitute facts, or together with other evidence and facts lead to further findings of fact. But "no evidence" is exactly that. "No evidence" itself is not evidence admitted into evidence for consideration. It is at best only speculation of what the evidence could have been. Unless there is evidence that the evidence was obtained and was withheld to justify consideration of whether an adverse presumption ought to be made, there is no basis for an adverse presumption merely because of non-production. Whilst commonly such argument is a device in rhetorical argument, it plays no part in solid or substantive judicial determination of what facts are proved or not.

[27] Intention, the necessary mental element, may be formed at any time and may be formed as quickly as the thought occurs. It is trite however that intention not something capable of physical production as evidence to prove it. It is a state of mind. It is found as a fact upon a consideration of all of the facts and circumstances of the particular case. While the fact that a person comes armed or with a plan to cause the death of the deceased may prove intention to cause death, the fact that he had not done so does not mean that if a death occurred there could not have been intention to cause the death.

[28] This case is based on circumstantial evidence. There is therefore no direct evidence of exactly what happened. But it is clear from the evidence and as explained by the learned judge, the available evidence suggests at best a struggle between the appellant and the deceased and no other.

[29] It was submitted for the appellant that:

> With regard to the issue of struggle, there was unsworn evidence from the appellant that there was indeed a struggle between him and the deceased. This aspect that there was a struggle was also confirmed by the pathologist.
>
> By reason that there was a struggle and someone could have lost some degree of control it is therefore imperative for His Lordship to ask himself whether these injuries could have been caused accidentally as a result of the struggle and the loss of control.

[30] The submission on this ground is founded on the reasoning of this court in *PP v. Megat Shahrizat Megat Shahrur* [2011] 5 CLJ 608. It concerns how the trial judge considered or failed to consider the question of whether the necessary mental element was present. In that case, this court did not interfere with the finding of the learned trial judge. The judge therein had said in her grounds of judgment:

> It is clear that there was no evidence on how long the accused had sat on the deceased and whether he had applied his whole body weight on the deceased or merely did it softly. It was clear that SP7 was not certain of the position of the deceased, whether she was sitting or lying down on the sofa when the accused sat on her. Obviously the impact would be greater if the deceased was lying down completely flat on the sofa as the pressing impact on the two organs would be more direct than if she was seated up. The fact that the sofa cushion could be folded showed that it was quite soft and could have cushioned the impact of the accused's body weight on the deceased. The mild manner of SP7's reproach of the accused, that "awak gila kah buat macam tu kepada budak itu" and the accused's reply "jangan risaulah dia ini tahan lasak", showed that whilst SP7 was disapproval of accused's behaviour, he certainly did not think the situation was serious enough to warrant his intervention beyond calling out to the deceased to come to him.
>
> In other words, based on the totality of the evidence before me, I was unable to make a positive finding that the accused had the *mens rea* stated in paragraph (c) of s. 300 of the Penal Code as relied upon by the prosecution. The learned DPP had submitted that this case was identical with the case of *PP v. Aziz Mat Shah* [2004] 7 CLJ 226 in which the accused was convicted of murder

A of a 3 year old child. However a perusal of the facts in that case shows that in that case there were direct evidence from the accused's two younger brothers who had witnessed the accused slapping the deceased, punching her stomach and chest hard and used a pillow to cover the deceased's face before the deceased had stopped crying. My view is that Aziz Mat Shah's case is totally different from the facts in this case and could be distinguished based on the facts.

[31] The Pathologist Dr Mohd Shah bin Mahmood (SP5) testified in cross-examination that:

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> kematian mangsa ini boleh disebabkan oleh kecederaan yang di alami dikepala, atau disebabkan oleh cekikan pada leher yang telah menyebabkan patahnya tulang hyoidnya atau kematian telah disebabkan oleh kedua-dua kecederaan tersebut.

D **[32]** He had earlier testified in examination-in-chief that:

> Maksud saya sama ada kedua-duanya atau salah satu daripadanya, boleh menyebabkan kematian si mati dan saya tidak dapat menentukan dengan tepat yang mana satu telah terlebih dahulu menyebabkan kematian si mati.

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[33] Whilst the strangulation was by hand, the head injury was explained thus:

> Kemungkinan besar akibat di pukul dengan alat yang keras dan tumpul dan sebahagian kecil adalah akibat dihentak atau terhantuk pada permukaan yang keras dan rata. ... Antara contoh, sebatang kayu, besi paip, tumbukan dengan tangan, tendangan dengan kaki.

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[34] The fracture to the hyoid bone was inflicted while the deceased was alive:

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> Gambar P6(AI) dan P6(AJ) menunjukkan kesan patah pada tulang 'hyoid' leher si mati. Pada gambar P6(AI) itu terdapat ada kesan darah yang telah beku pada tulang hyoid yang patah. Ini menunjukkan bahawa bila ia patah, orang punya masih hidup, kerana jika orang punya tulang 'hyoid' ini sudah mati, jika ianya patah, tidak akan meninggalkan bekas darah beku padanya.

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[35] That there was a struggle may be inferred from the following testimony:

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> Cekikan tidak semestinya meninggalkan bekas cekikan di kulit leher. Tetapi dalam kes ini, gambar P6(X) menunjukkan satu kecederaan cakaran di tempat no. 10 dalam gambar itu, di mana kemungkinan si mati cuba melepaskan genggaman cekikan di lehernya oleh penyerangnya.

[36] SP5 had also testified in examination-in-chief:

> Berdasarkan taburan kedudukan kecederaan-kecederaan yang di alami si mati saya berpendapat si mati berkeadaan sama ada dalam keadaan duduk atau berbaring tetapi yang pastinya dia berhadapan dengan penyerangnya. ... Saya berpendapat ianya selaras dengan kecederaan tangkisan, bermaksud si mati sedar ia diserang dan cuba mempertahankan.

[37] We turn back now to the submission for the appellant. It was submitted:

> ...
>
> The learned trial judge essentially looked at the nature of the injuries. He did not look at the other relevant significant aspects that will have a definite bearing with regard to the issue of *mens rea* or intention which said aspects spoke in favour of the appellant.
>
> ...
>
> Our complaint with the above passage is two-fold:
>
> (a) there is clear ambiguity in the trial judge was unsure whether it is a case under limb (b) or (c); and
>
> (b) if it is limb (c) then the trial court must go further to find that the injuries found on the body of the deceased were the injuries intended by the appellant.

[38] At the end of the prosecution case, the evidence before the court was that the serious injuries were classified by SP5 as defensive wounds. The nature of the injuries are such they are not accidental injuries incurred in the course of a struggle, but were injuries suffered by someone whose other injuries showed she was defending herself. The length and detail the learned judge went to was to address the submissions made before the learned judge, but the plain fact before the court is the deceased's injuries were not self inflicted, and her injuries other than the two injuries that caused her death were defensive injuries against an assailant from her front. We found no error in the learned judge's assessment of the evidence before him as at the end of the prosecution case to hold that the prosecution had made out a *prima facie* case, being a case which if unrebutted or unexplained, would warrant a conviction (see s. 180(4) Criminal Procedure Code).

[39] In respect of the case for the defence, we examined the unsworn statement form the dock. It is trite that the burden of proving its case beyond reasonable doubt remains always upon the prosecution, and the rebuttal or explanation by the defence therefore need only raise a reasonable doubt. See *Mat v. PP* [1963] 1 LNS 82, per Sufian J; *Mohamad Radhi Yaacob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311. The defence ought not to be brushed aside simply because it looks weak or because it is not believed. It is the court's duty to consider that defence raised, and to decide whether it raises a reasonable doubt. See *Ganapathy Rengasamy v. PP* [1998] 2 CLJ 1. The question could well be asked that if the version is not believed, how could it raise a reasonable doubt. The answer is that the direct question that the court is required to address is not whether it believes the accused's version or not, but whether it raises a reasonable doubt. The best explanation of what is a reasonable doubt consistent with this approach is that given by Denning J in *Miller v. Minister of Pensions* [1947] 2 All ER 372:

> [The degree of cogency]. … need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

[40] It means that one is to take the version of the accused person and bring it alongside the evidence adduced by the prosecution. If the accused's person's version is merely possible, then it is not enough to raise a reasonable doubt. But if, brought to condescend to the evidence before the court, there is the least probability to it, then it is a reasonable doubt, and the accused must be acquitted.

[41] We find that the learned trial judge in this case had correctly directed himself as to what he has to consider, what a reasonable doubt means, that of a question of fact he must direct himself as a judge would have been required to do to direct a jury, that although the statement by the appellant is an unsworn statement, he must take it into account and give it the weight as is fit in the

light of all the evidence and circumstances of the case. We are satisfied the learned judge had done so. He re-examined the evidence and concluded at para. 45 of his grounds of judgment that:

> ... from the objective conclusions arrived at by the Chemist (SP8), it is my finding too, that at the time of the deadly assault perpetrated by this accused on the deceased, the accused was alone. In other words, as no traces of Roslan's DNA was profiled from the human stains retrieved from the person of the deceased or from the specimens retrieved from the various exhibits recovered at the scene of crime, the accused's version in D64 that when he came to, he saw Roslan standing by the deceased who was lying on the mattress on the floor, could not, in all probabilities be sustained. Although D64 did not say expressly that Roslan must have been the person responsible for having caused the head injury suffered by the deceased, nevertheless the insinuations were there and were all too clear to be missed. Looking at D64, apart from it saying that Roslan was at the scene of the crime, this court was not able to see anything contained in it that could rebut the evidence of SP8 and SP5. These witnesses have been independent witnesses and from their objectively and scientifically observed facts, there was nothing to suggest that their resultant findings and observations had been actuated by some oblique motive against the accused in this case. They had just reported to this court what they saw in their laboratory or on the autopsy table. The evidence of the Chemist SP8 had clearly exonerated Roslan, because pursuant to the DNA analysis done by SP8, there was no matching of Roslan's DNA profile developed from his blood sample marked 'E25' with any DNA profiles developed from the numerous samples sent by the police, particularly, those specimens marked as 'E6' which had been established by SP8 as having emanated from the deceased. ...

[42] We can find neither error nor in reason to disagree with the reasoning of and the conclusion arrived at by the learned trial judge, leading to the conclusion that the rebuttal or explanation by the appellant in his defence did not raise a reasonable doubt.

[43] Accordingly, we dismissed the appeal and affirmed the conviction and sentence by the High Court.